

Louisiana Law Review

Volume 51 | Number 3

January 1991

Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication

Beau James Brock

Repository Citation

Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. (1991)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol51/iss3/10>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication

Introduction

An advocate's chief obligation is to help his client avoid litigation in resolving legal dilemmas.¹ At times, however, it is only through judicial proceedings that the client's best interest can be served. In choosing to pursue an action in the state or federal courts, an attorney must be able to predict the probable outcome of his client's case based on the applicable legislation and jurisprudence concerning the facts relevant to the case. Further, he must be able to discern in issues of law the interpretation which individual judges will likely give to those statutes and cases. This factor is especially important if the case reaches the Supreme Court of the United States.²

A fundamental fault with much constitutional scholarship is the assumption that the Court should act like an ordinary court.³ Justice Lewis Powell said in 1979 that:

It [the Supreme Court] is empowered to decide whether the other two branches of government (and the states) live within the Constitution That's a rather awesome power and it's one that makes our system and our Court distinctive.⁴

Copyright 1991, by LOUISIANA LAW REVIEW.

1. See, e.g., W. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 45 (1990) ("Davis was keenly sensitive to the attorney's role as conciliator. As he once remarked after resolving a domestic quarrel, the lawyer was obligated to prevent strife when possible, and the man who appreciated the real height of the profession had as many opportunities to do good as a clergyman. Unfortunately, many lawyers failed to fulfill the ideal.").

2. See W. Rehnquist, *The Supreme Court; How It Was, How It Is* 253 (1987) ("The work of the Court consists essentially of three different functions: (1) choosing from among more than 4,000 'petitions for certiorari' somewhere around 150 cases in which certiorari is granted; (2) deciding these 150, which includes studying the briefs, hearing oral arguments by the lawyers for the parties, and voting on them at conference; and (3) preparing written opinions supporting the result reached by the majority and separate opinions and dissenting opinions by those [J]ustices who do not agree with the reasoning of the majority.").

3. A. Miller, *Toward Increased Judicial Activism: The Political Role of the Supreme Court* 39 (1982); See also Stewart, *The Great Persuader*, 76 A.B.A.J. 61 (Nov. 1990) ("Brennan was fond of telling his law clerks that the first rule of the Supreme Court was that it takes five votes to win.").

4. A. Miller, *supra* note 3, at 39.

This article will concentrate on the present and future influence of Justice Antonin Scalia on constitutional adjudication in the Supreme Court.⁵ Justice Scalia was appointed by President Ronald Reagan on September 26, 1986, filling Justice Rehnquist's vacated Eighth Chair on the Court.⁶ He has brought to the Court an energetic and courageous brand of positivism that the Court has not evinced in its opinions since the departure of Justice Hugo Black.⁷ This vitality has blunted scholarly criticisms of his stewardship of the Constitution.⁸ In fact, recently, Justice Scalia has been identified as an "emblematic rather than an enigmatic figure."⁹

This article will discuss the political presence and future of Justice Scalia on the Court and the practical implications that flow from that presence; pinpoint his judicial methodology upon the spectrum of traditional legal philosophies of law; illustrate the link between his theory of law and modern American positivism; and trace, through his Supreme Court opinions, the positivism and use of history which Justice Scalia uses in his decision-making process. Furthermore, this writer will argue that the personification of the antithesis of Justice Scalia's judicial methodology on the Court is Justice Sandra Day O'Connor. Justice O'Connor, although politically a conservative in many areas of the law, utilizes a balancing of interests analysis based on a cost-benefit utilitarianism¹⁰

5. Recently appointed as Circuit Justice for the Fifth Circuit Court of Appeals.

6. Among the existing Chairs on the Supreme Court, the Eighth Chair maintains the most exclusive list consisting of only eight Justices; two of whom were later appointed Chief Justice.

7. Justice Black served on the Supreme Court from 1937 until retiring in 1971.

8. But see Yoder, *Trying to Figure Out Scalia*, Wash. Post, Aug. 1, 1989, at A21, col. 6; Gelfand & Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents From Justices O'Connor and Scalia*, 64 Tul. L. Rev. 1443, 1462-63 n.8 (1990) ("Though beyond the scope of this Essay, the tensions, apparent inconsistencies, and rationalization of Scalia's theories of constitutional and statutory interpretation are worthy of careful scholarly examination.").

9. Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 Yale L.J. 1297, 1299 (1990).

10. Later, this article will more greatly detail Justice O'Connor's location on the spectrum of judicial methodology based on the premise that it is evolved from the teachings of Roscoe Pound.

Introduced to the United States through the writings of Roscoe Pound, the German jurist Rudolph von Jhering (1818-1892) is considered a founding architect of the school of legal utilitarianism.

The central notion in Jhering's philosophy of law was the concept of *purpose*. In the preface to his chief jurisprudential work, he pointed out that "the fundamental idea of the present work consists in the thought that *Purpose* is the creator of the entire law; that there is no legal rule which does not owe its origin to a purpose, i.e. to a practical motive." R.

or a pragmatic approach.¹¹ This article will foil this philosophy against that of Justice Scalia in order to provide the reader with a better understanding of Justice Scalia's judicial philosophy.

The Next Chief Justice

It appears that the people of our country are currently content with a federal government run by a Democratic Congress and a Republican executive. Unless the Democratic party can construct a more broadly based coalition in its pursuit for the presidency, it will continue to visit the White House instead of residing there.¹² Consequently, the Republican Party has held exclusive *de facto* control over the Supreme Court nomination process since 1969.¹³ During that time, Republican presidents have seated eight Justices onto the Supreme Court.¹⁴

Chief Justice Rehnquist has now served on the Court for eighteen

Jhering, *Law as a Means to an End* liv (transl. I. Husik) (1924).

Law, he declared, was consciously set by the human will to achieve certain desired results. He admitted that the institution had part of its roots in history; but he rejected the contention of the historical jurists that law was nothing but the product of unintended, unconscious, purely historical forces. R. Jhering, *The Struggle for Law* 6-11 (transl. J. Lalor 8-9) (1879).

The end or purpose of legal regulation was indicated by Jhering in his often-quoted definition of law: "Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion." R. Jhering, *Law as a Means to an End*, supra, at 380. See also E. Bodenheimer, *Jurisprudence; The Philosophy and Method of the Law* 86-87 (2d ed. 1962).

11. For a working definition of judicial pragmatism, see J. Cueto-Rua, *Judicial Methods of Interpretation of the Law* 191 (1981):

The mere fact that the application of the rule, as traditionally understood and applied, may cause unexpected and extended hardship is an indication that logical treatment may be insufficient or that logical development has gone too far.

A line needs to be drawn. The point at which hardship and general inconvenience begins may be a good place to draw that line by introducing pragmatic criteria for the narrower definition of the area where the precedent, as traditionally interpreted, ought to operate.

If the consequences to be brought about by the traditional interpretation of the rule are negative or if no social interests appear to be satisfied by logical adherence to past meanings, the time may be ripe for a re-definition of the rule.

12. See, e.g., R. Kuttner, *The Life of the Party; Democratic Prospects in 1988 and Beyond* (1987).

13. During President Carter's term from 1977-1981, there was no opportunity to nominate a Justice to the Supreme Court.

14. Historically, previous single-party control of the nomination process had the following *de facto* results: (1) Washington and the Federalists (1789-1801) 14 seats; (2) Republicans (1862-1882) 14 seats; (3) Republicans (1898-1912) 10 seats; and (4) Democrats (1937-1949) 11 seats.

years. Statistics show that only eleven Justices have served thirty years or more.¹⁵ Thus, his tenure on the Court should realistically expire within the next decade unless he breaks all longevity records.¹⁶ His appointment as Chief Justice in 1986 was extraordinary in that only three previous Associate Justices were later successfully appointed Chief.¹⁷

Conservative Court watchers have been exuberant in following Chief Justice Rehnquist's Court in action. The lesson to be learned from the "Rehnquist success" for conservatives is that to ensure anticipated results, an incumbent Justice should be nominated for the Chief's seat.¹⁸ The prospect of returning to an "activist" Warren or Burger Court is unconscionable to contemporary conservatives. The politically astute are aware that both of these men were appointed as Chief Justice from outside the Court by Republican administrations hoping to inject restraint into the Court's adjudication. Because those hopes were dashed, and because a repetition of that scenario is sought to be avoided by today's conservative policymakers, this author believes that the next Chief Justice will be either Antonin Scalia or Sandra Day O'Connor.

Justice Scalia's academic and practical experiences prior to his service on the Court have been well documented by legal scholars.¹⁹ Untouched by contemporary students of the Court, however, is mention of the historical significance of Justice Scalia's presence on the Court. He was only the seventh Catholic,²⁰ the fourteenth with continental European lineage,²¹ and the first Italian-American on the Court. At the age of fifty when appointed, he was slightly below the median age of appointment for the Court,²² and was the fourteenth Justice seated from the state of New York.²³

Justice O'Connor entered service on the Supreme Court on September

15. See A. Blaustein & R. Mersky, *The First Hundred Justices* 28-29 (1978).

16. The record for longevity on the Court is held by William O. Douglas who served from 1939-1975, a period of thirty-six years, six months and twenty-six days. *Id.* at 28. Douglas was 40 years old when he joined the Court while Rehnquist was 47 years old.

17. *Id.* at 126. This list includes Edward Douglass White (1910), Charles Evans Hughes (1930) & Harlan Fiske Stone (1941). Both John Rutledge and Abe Fortas failed to be confirmed as Chief after serving as Associate Justices.

18. This author subscribes to the opinion that the failure in nominating Abe Fortas to the position of Chief Justice was in large part a question of ethics. See also *id.* at 47.

19. See, e.g., Gelfand & Werhan, *supra* note 8; Yoder, *supra* note 8; Kannar, *supra* note 9.

20. Justice Anthony Kennedy became the eighth Catholic upon his being seated. The only time the Court had three Catholics serving simultaneously came to an end this summer when Justice Brennan retired.

21. A. Blaustein & R. Mersky, *supra* note 15, at 60-61.

22. *Id.* at 26.

23. *Id.* at 25. New York has contributed more Justices to the Court than any other state.

25, 1981.²⁴ The political significance of her gender cannot be understated. This factor alone places her high among potential nominees in filling a vacated seat as Chief Justice.

Further, both of these Justices are young and conservative with strong views on matters of judicial restraint and federal jurisdiction²⁵ which seem to be amiable to the present United States Senate which must, of course, confirm any new appointment to the Court.²⁶ These political advantages are compounded by the fact that every other sitting Justice either has not developed a reliable paper trail as yet or is too old for appointment as Chief Justice.²⁷

This discussion is important because the Chief Justice has the authority to assign the drafting of opinions when he is in the majority in cases before the Court. This authority is jealously guarded, and has been frequently utilized when a Chief Justice wishes the Court to present a unanimous front to the public,²⁸ or when he wishes to limit the expansiveness of a particular holding of the Court.²⁹

The differences in methodology between the Justices Scalia and O'Connor will be explored in order to determine how their philosophies will impact the Court's adjudication if either of them were to obtain the "First Chair."

Justice Scalia on the Jurisprudential Spectrum

The modern spectrum of jurisprudence includes legal schools of analytical positivism, history, natural law, and pragmatism. Although sparring

24. For a detailed look at Justice O'Connor's background, see Savage, Justice Sandra Day O'Connor, in *Eight Men and A Lady: Profiles of the Justices of the Supreme Court* (1990).

25. See, e.g., O'Connor, *Our Judicial Federalism*, 35 Case Wes. Res. 1 (1984); O'Connor, *Reflections on the Preclusion of Judicial Review in England and the United States*, 27 Wm. & Mary L. Rev. 643 (1986); Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 Duke L.J. 511 (June 1989); Scalia, *The Role of the Judiciary in Deregulation*, 55 Antitrust 191 (1986); Scalia, *The Two Faces of Federalism*, 6 Harv. J. L. & Pub. Pol'y 19 (1982); *Finley v. United States*, 109 S. Ct. 2003 (1989) (Scalia, J.); *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513 (1988) (Scalia, J. & O'Connor, J., concurring).

26. An in-depth look at the hearings to confirm Justice Souter as a member of the Court is illustrative of this fact. Also, in the aftermath of the Souter hearings, it should be easier to elevate one of the current Justices to the Chief Justice's seat as his or her professional competence to preside on the Court won't be an issue. This was important in the Souter hearings as the Senate staked out the political position that it would not have litmus tests, and only sought to determine competency.

27. The oldest Associate Justice to be elevated to Chief Justice was Harlan Fiske Stone who was sixty-eight. A. Blaustein, *supra* note 15, at 27.

28. See, e.g., *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954).

29. See, e.g., *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183 (1980); B. Woodward & S. Armstrong, *The Brethren: Inside the Supreme Court* (1979).

occurs among Justices on the Supreme Court in the pages of written opinions³⁰ and during oral arguments, the differences between Justices Scalia and O'Connor arise from their conflicting judicial philosophies which lie at opposite ends of the spectrum.³¹

I.

Pragmatism in the modern American legal philosophy evolved from Roscoe Pound's sociological jurisprudence.³² Pound based his ideology of law on the "satisfying of wants" of individual interests, public interests, and social interests.³³ He stated that:

[I]ndividual interests are claims or demands or desires involved immediately in the individual life and asserted in title of that life. Public interests are claims or demands or desires involved in life in a politically organized society and asserted in title of that organization Social interests are claims or demands or desires involved in social life in civilized society and asserted in title of that life.³⁴

Pound believed that there were also other interest groups, and that these groups would overlap at times in attempts to achieve their wants. In fact, according to Pound, law is "made up of adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a

30. See, e.g., Justice Scalia's treatment of Justice Brennan's concurrence in *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990).

31. The Modern Court has been beset by personal quarreling among its members, yet, the "rift" on the pages of the reports between Scalia and O'Connor does not even begin to approach the war Justice Robert Jackson had with Justice Hugo Black. See R. Conot, *Justice at Nuremberg* 442 (1983).

32. "American jurisprudence will ever be indebted to Roscoe Pound. In the service of quickening our legal institutions and making the law effective for the task of wise "social engineering," he has combined profound insight, vast legal erudition, thorough acquaintance with the work of early and contemporary legal philosophers in England and the Continent [see *supra* note 10], and a wide knowledge of the social sciences." J. Frank, *Law and the Modern Mind* 207 (1935).

"Roscoe Pound (1870-1964) was modern America's foremost legal scholar. His sociological jurisprudence blended legal concepts with pragmatism and social science into a new synthesis that replaced the sterile conception of law as a closed system of timeless doctrine.

He was office-trained and school-trained; he was a trial lawyer in the rugged courthouse world of pioneer Nebraska and a master of the appellate brief; he was a judge, a teacher, a dean, an advisor to government, and a scholar whose name became a synonym for legal wisdom." D. Wigdor, *Roscoe Pound; Philosopher of Law* ix (1974).

33. Pound, *A Survey of Social Interests*, 57 *Harv. L. Rev.* 1 (1943).

34. *Id.* at 1-2.

reasonable adjustment.”³⁵ The reverse in the balance, a striving for legal order in society, was explained by Pound as “stating a paramount *social* interest in the general security in terms of individual liberty.”³⁶ Pound even went so far as to say that “[f]rom time to time more or less reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.”³⁷ This concept was echoed through the legal careers of Supreme Court Justice William Brennan and Louisiana Supreme Court Justice Albert Tate.³⁸

This philosophy of the judge as the arbiter of competing societal interests in deciding the proper holding of a case corresponds with Justice O'Connor's methodology as well. In fact, Justice O'Connor has continuously used societal balancing in her analyses in all areas of constitutional law.³⁹ Although the pragmatic source of analysis is shared by Justices Brennan and O'Connor, Justice Brennan aggressively supported the individual side of the equation when balanced against societal or public interests⁴⁰ while Justice O'Connor has consistently chosen not to place any coins on the scale before hearing all claims. Also, consequent to her position of judicial restraint, she would not be prone to accept the more “activist Poundian” strain of analysis which Brennan and Tate both advocated. Justice O'Connor stated, even before she was on the bench, that “[i]t is not the duty of the Court to react to the social climate and enact change.”⁴¹ Therefore, her pragmatism may not be as progressive as

35. *Id.* at 4.

36. *Id.* at 9 (emphasis added).

37. Pound, *Justice According to Law*, 13 *Colum. L. Rev.* 696, 699 (1913).

38. See, e.g., Barham, *A Civilian For Our Times: Justice Albert Tate, Jr.*, 47 *La. L. Rev.* 929 (1987); Friedelbaum, *Justice Brennan and the Burger Court: Policy-Making in the Judicial Thicket*, 19 *Seton Hall L. Rev.* 188 (1989).

39. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793 (1987) (O'Connor, J., dissenting); *Garcia v. San Antonio Met. Tran. Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985) (O'Connor, J., dissenting). But see Note, Sandra Day O'Connor, Abortion, and Compromise for the Court, 5 *Touro L. Rev.* 327, 339-42 (1989). In part of this article, the author states that Justice O'Connor seeks bright lines in some areas of the law. However, other than Justice O'Connor's respect for the *Miranda* rule in her dissent in *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984), the writer only urges that she is upset with the current standards of review for equal protection claims.

40. Some writers have, of course, gone much further in their aversion to the work of the Modern Court and its activism in the protection of civil liberties. See, e.g., W. Eaton, *Who Killed the Constitution* 5 (1988) (“This most recent era differs from prior eras of unauthorized judicial action in that, instead of merely vetoing legislation of Congress or the States, the Court has *invented* a whole *legislative* program of its own, and imposed that program upon the country.”).

41. See *The Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 57 (1981).

Pound would have liked, but her flexibility in balancing societal interests has placed her squarely within his school of reasoning.⁴²

II.

The second modern school of legal thought is natural law.⁴³ The American form of government had its structural foundation in the writings of natural law scholars such as John Locke and Baron Charles Louis de Montesquieu. Both of these philosophers emphasized "liberty" above "order" in their legal theories. Locke stated in his work, *Of Civil Government*, that "the law of nature stands as an eternal rule to all men, legislators as well as others."⁴⁴

Natural law was advocated by members of our early Court such as James Wilson,⁴⁵ Samuel Chase,⁴⁶ and Joseph Story.⁴⁷ However, as the nineteenth century progressed, concepts of natural law gave way to legal theories supporting order in our society. It would not be until after World War II that there would be a popular revival of natural law theories.⁴⁸

42. The balancing of Justice O'Connor more closely resembles the vision sought by Pound as he "did not develop sociological jurisprudence as a foundation for far-reaching social departures." D. Wigdor, *supra* note 32, at 284.

43. There are several different modern subdivisions of natural law such as Neo-Kantian, Neo-Scholastic, Duguit's Legal Philosophy, the Policy-Science of Lasswell and McDougal, and others which this article will not be able to discuss in depth. See E. Bodenhimer, *supra* note 10.

44. *Id.* at 46.

45. Associate Justice on the Supreme Court 1789-1798. See J. Wilson, *Works* 49 (1896) ("Order, proportion, and fitness pervade the universe. Around us we see; within us we feel; above us, we admire a rule from which deviation cannot, or should not, or will not be made. Human law, must depend for its ultimate sanction on this immutable law of nature."). See also E. Bodenhimer, *supra* note 10, at 50-51.

46. Associate Justice on the Supreme Court 1796-1811. See Justice Chase's argument for the Court on natural law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). His argument comes straight from Locke's writings on the social compact between man and government.

47. Associate Justice on the Supreme Court 1811-1845. See Story, *Essay on Natural Law*, 34 *Or. L. Rev.* 88 (1955) (reprint).

48. This reemergence of natural law primarily was caused by the reaction to the Nazi's use of positivism to explain their legal responsibilities to the state in carrying out the law. If the theoretical basis for this positivism was "fanatical," there would not have been the reaction that ensued.

The Nazi view of the law was not some aberration from the lunatic fringe. It evoked a sympathetic response from a considerable number of academic lawyers and members of the legal profession. The most authoritative of the academic lawyers in Nazi Germany . . . was Ernst Rudolf Huber, Professor of Jurisprudence at Kiel. Huber expressed the following views on the law:

The law is nothing other than the expression of the communal order in which the people live and which derives from the Fuhrer. The Fuhrer Law makes concrete the unwritten principles of the [people's] communal life. It is therefore impossible to measure the laws of the Fuhrer against a higher concept of the law because

In fact, some philosophers completely reversed their understanding of what law is due to the excesses of the Nazi period.

A chief example of this conversion is German philosopher Gustav Radbruch.⁴⁹ Prior to the war, Radbruch believed that justice had as its foundation the idea of legal certainty, which demands the promulgation and maintenance of a positive and binding legal order of the state.⁵⁰ After the war, he argued that legal positivism had left Germany defenseless against the abuses of the Nazi regime and that it was necessary to recognize situations where a totally unjust positive law must give way to justice.⁵¹

The Supreme Court has, in substance, throughout its history, attempted to preserve Justice Chase's position that the judiciary's role is to ensure that the government did not violate the rights of the people arising from the natural law.⁵² The greatest illustration of this occurring on the modern Court was Justice John Marshall Harlan's concurrence in *Griswold v. Connecticut*.⁵³

This writer believes that, on the spectrum of legal philosophy, Justice Scalia's methods are closer to natural law than to pragmatism. Pragmatists do not inherently seek legal certainty at all, but approach *the law* in a case-by-case manner, seeking to balance conflicting societal interests. Adherents of natural law seek legal certainty, yet do not confine or *restrain* their analyses to structured rules emanating from a legislature or sovereign. The fundamental difference between natural law and positivism, therefore, is that the objective of natural law is to espouse *what law ought to be*, whereas positivism declares *what law is*.

every Fuhrer law is a direct expression of this [people's] concept of the law.

J. Noakes & G. Pridham, *Nazism; A History in Documents and Eyewitness Accounts, 1919-1945* 475-476 (1983).

The postwar trials of German public officials continued after the surviving top Nazi leaders were prosecuted in 1946. However, due to the political pressure of the Cold War, these tribunals ended by 1949. In fact, by 1951, only a few of the convicted were still incarcerated. One of the judges in the I.G. Farben case during this time was L.S.U. Law School Dean Paul Hebert. He became so incensed by the leniency of the sentence given by his two fellow judges that "he issued a withering blast accusing them of bias in favor of the accused." R. Conot, *supra* note 31, at 517.

49. Gustav Radbruch (1878-1949) was a German legal philosopher who started out from a neo-Kantian philosophy of values and ended his life as a convert to natural law in a moderate form.

50. E. Bodenheimer, *supra* note 10, at 132.

51. *Id.* at 133-34.

52. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 332 (3d ed. 1986).

53. 381 U.S. 479, 85 S. Ct. 1678 (1965) (Harlan, J., concurring). Interestingly enough, during Justice Souter's confirmation hearings, he stated that his position on a right to privacy conformed to Justice Harlan's in *Griswold*. Hearing on the Confirmation of Judge David Souter Before the Senate Judiciary Committee, 101st Cong., 2nd Sess. (1990).

III.

Legal positivism arose in the nineteenth century as the legal community incorporated the ideas of the scientific method into adjudication.⁵⁴ The legal positivist holds that only positive law, those juridical norms which have been established by the authority of the state, is *law*.⁵⁵ The legal positivist also insists on a strict separation of positive law from ethics and social policy, and tends to identify justice with legality, that is, with observance of the rules laid down by the state.⁵⁶

Justice Hugo Black towers above all other modern American positivists because he was able to exercise that philosophy in fact on the Court. His positivism was central to his decision-making process throughout his career.⁵⁷

Justice Scalia has also acknowledged in his extrajudicial writings that he is a positivist.⁵⁸ He has stated that the common law discretion-conferring approach is ill-suited to a legal system in which the Supreme Court can review only an insignificant proportion of the decided cases.⁵⁹ Justice Scalia avers that this approach is inappropriate for the Supreme Court because:

[t]he fact is that when we decide a case on the basis of what we have come to call the "totality of the circumstances" test, it is not we who will be "closing in on the law" in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts.⁶⁰

This type of system will suffer from a complete lack of uniformity, and the failure to promulgate uniformity will result in the inability to predict the consequences of legal action. "Predictability, or as Llewellyn put it, 'reconability,' is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all."⁶¹

54. "A careful observation of empirical facts and sense data was one of the principal methods used in the natural sciences. It was hoped that in the social sciences this same method would prove to be highly fruitful and valuable." E. Bodenhimer, *supra* note 10, at 91.

55. See, e.g., Parker, *Legal Positivism*, 32 *Notre Dame L. Rev.* 31 (1956).

56. E. Bodenhimer, *supra* note 10, at 93.

57. See T. Yarbrough, *Mr. Justice Black and His Critics* (1988); But also see C. Williams, *Hugo L. Black: A Study in the Judicial Process* (1950); Reich, *Mr. Justice Black and the Living Constitution*, 76 *Harv. L. Rev.* 673 (1983); J. Frank, *Mr. Justice Black: The Man and His Opinions* (1949).

58. See, e.g., Scalia, *The Rule of Law as a Law of Rules*, *U. Chi. L. Rev.* 1175 (1989).

59. *Id.* at 1178.

60. *Id.* at 1179.

61. *Id.*

The positivist, in attempting to discover the scope and meaning of statutes and precedents, will look to the history surrounding a particular ruling or enactment when merely reading its text would be insufficient in formulating a holding.

IV.

The final modern school of legal thought is history.⁶² Students of the historical school view law not as a product of an arbitrary and deliberate will but of a slow, gradual, and organic growth.⁶³ The concept of legal historical jurisprudence sounds foreign to most practitioners and judges as well. Its roots are German and theoretically is a reaction against the ideas upon which our modern society was founded.⁶⁴ Religious devotion to this school of thought involves a dislike of legislation and an emphasis upon silent, anonymous, and unconscious forces as true elements of legal growth in which no legislator should be allowed to interfere.⁶⁵

In theory this frequency on the spectrum of law is remote from positivism, as positivism bases law on the authority of the state through legislation and precedent. However, in practice, history often works in conjunction with positivism under theories such as "originalism."⁶⁶ This may confuse those attempting to understand a positivist's use of history.⁶⁷ Positivists akin to Justice Scalia will look to history to help in ascertaining the meaning given to legislation. Specifically, Justice Scalia feels that "[o]riginalism does not aggravate the principal weakness of the system [of judicial review],⁶⁸ for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."⁶⁹ The sphere

62. The founder and chief exponent of the English historical school of law was Sir Henry Maine (1822-1888). His studies led him to the conviction that the legal history of peoples shows patterns of evolution which recur in different social orders and in similar historical circumstances. E. Bodenheim, *supra* note 10, at 74.

63. *Id.* at 72.

64. The classical law of nature, as an essentially revolutionary doctrine, looked to the future. The historical school, as a reaction to it, looked to the past. In evaluating the historical school of law it should not be forgotten that Savigny was a conservative nobleman who detested the equalitarian rationalism of the French Revolution.

Id. at 73.

65. *Id.* at 73.

66. See Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

67. See, e.g., Professor Laurence Tribe's frustration in figuring how Justice Scalia can justifiably rule the way he does in, L. Tribe, *Abortion: The Clash of Absolutes* 100 (1990) ("In almost every case, of course, no matter what axis we examine, Justice Scalia's test will mandate a conclusion that there is no tradition protecting the asserted right.").

68. The principal defect being that "judges will mistake their own predilections for the law." Scalia, *supra* note 66, at 863.

69. *Id.* at 864.

of positivism relies inherently on history,⁷⁰ yet, the positivistic notion of using history as a *tool* instead of as an *oracle* has been utilized frequently by the Supreme Court since 1900.⁷¹

V.

Justice Scalia's legal philosophy can, therefore, be placed in the school of positivism, far from the school of pragmatism from which Justice O'Connor draws her reasoning. His decisions are based on strict interpretations of statutes, constitutional provisions, and precedents. Ambiguities are deciphered by utilization of history, though any devices which aid him in creating *legal certainty* may be employed.⁷²

Modern American Positivism

Such eminent legal scholars as Pound, Justice Benjamin Cardozo, Justice Oliver Wendell Holmes and Jerome Frank harshly criticized positivism. They considered it overly mechanical, and cited its failure to utilize non-formal elements of law in its analysis, thus limiting its effectiveness in adapting to the needs of a modern society.⁷³ These learned men chose different paths of legal reasoning in their assaults on positivism; however, they all would agree that:

[t]he attempt to emancipate the law from the social and economic

70. In fact, "genuine interpretation of law is the discovery of the intention with which [the sovereign] constructed the statute, or of the sense which he attached to the words wherein the statute is expressed." J. Austin, *Lectures on Jurisprudence* 1023 (4th ed. 1873).

71. See J. Daly, *The Use of History in the Decisions of the Supreme Court: 1900-1930* (1954). In particular, Mr. Daly emphasizes the especially strong reliance on history by Chief Justice Edward D. White. "It seems safe to say that Chief Justice White was the leading historian on his own Court. The cases here presented display again his ability to read history, and to deduce therefrom all the significant data and interpretations for application to the problem at hand." *Id.* at 152.

See also Baier, *Edward Douglass White: Frame For a Portrait*, 43 *La. L. Rev.* 1001 (1983). This oration celebrated the achievements of Louisiana's only representative on the Supreme Court who rose from Associate Justice to Chief Justice during his tenure. See also *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507 (1921) (Justice Holmes' famous quote that "A page of history is worth a volume of logic.").

72. See Scalia, *supra* note 66, at 864, where Justice Scalia claims to be a "fainthearted originalist." Based on this claim, this author believes that Justice Scalia will also rely on other legal bases which foster legal certainty such as natural law. This conclusion is also supported by Justice Scalia's own hypothetical on flogging in the article cited above and his answer to it concerning "evolutionary content." *Id.*

73. See, e.g., Pound, *The Theory of Judicial Decision*, 36 *Harv. L. Rev.* 641 (1923).

forces that are instrumental in shaping its institutions can at best have a partial success. In the long run, logic is apt to lead to life, and technicality to justice and social need.⁷⁴

Thus, the greatest legal minds in America, even before the coming of the Second World War, were gouging at the core of the legitimacy of positivism. These criticisms bore fruit amongst students of their time, and the reaction to positivism's manipulation by dictatorial governments sounded its death knell to many in our judicial system.⁷⁵

Enter Justice Hugo Black. Justice Black was a great many things to a great many people. No person who sits on the Supreme Court for over thirty years can realistically have every one of his opinions pigeonholed under a particular philosophy of law. However, after his dissent in *Adamson v. California* in 1947,⁷⁶ Justice Black attempted to remain consistent in his constitutional determinations by utilizing positivism in a form he himself described as "absolutism." In *Adamson*, he "made it clear that the Bill of Rights sets limits as well as horizons for him, while others on the Court were unwilling to make this commitment and chose to regard the Bill of Rights as furnishing a minimal, not a preemptive, content to the fourteenth amendment."⁷⁷ Also, in a speech delivered at the New York School of Law in 1960, Black lashed out at those who would balance freedoms guaranteed in the Bill of Rights by stating: "I cannot accept this approach to the Bill of Rights. It is my belief that there *are* 'absolutes' in our Bill of Rights, and they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"⁷⁸

Justice Black's governing canon of constitutional interpretation is to search for the natural meaning of the text of the Constitution in contrast to relying on natural law.⁷⁹ When this meaning was ambiguous, his analysis involved a healthy reliance on history as a tool.⁸⁰

Justice Black took a position as a defender of these "absolute" rights which compelled judicial action where the Constitution required it, thereby

74. E. Bodenhimer, *supra* note 10, at 174.

75. See Northrup, *Contemporary Jurisprudence and International Law*, 61 *Yale L.J.* 623 (1952).

76. 332 U.S. 46, 67 S. Ct. 1672 (1947) (Black, J., dissenting).

77. P. Freund, *On Law and Justice* 217 (1968).

78. Dillard, *The Individual and the Bill of Absolute Rights, Hugo Black and the Supreme Court: A Symposium* 100 (1967).

79. P. Freund, *supra* note 77, at 215.

80. But see A. Bickel, *The Least Dangerous Branch* 73, 98-110 (2d ed. 1986) (Mr. Bickel recognizes Justice Black's positivism and makes a scholarly attack against all the weaknesses of such a philosophy. Here, he claims Justice Black's reliance on history is unsuitable especially in areas such as the Fourteenth Amendment.).

inviting a renaissance of substantive judging.⁸¹ The greatest examples of his "activism" in protecting these rights occurred in first amendment cases. He placed the protection of free speech in a preferred position⁸² by dissenting in *Milk Wagon Drivers Union v. Meadowmoor Dairies*.⁸³ He stated:

And in reaching my conclusion I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.⁸⁴

Thirty years later, in *New York Times Co. v. United States*,⁸⁵ his last quotation from the bench was "[t]he greater the importance of safeguarding the community from incitement to the overthrow of our institutions . . . the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly."⁸⁶ For him, these freedoms also shielded types of speech that the majority of the Court considered unprotected, such as obscenity⁸⁷ and libel.⁸⁸

In spite of this espoused absolute right of freedom of speech, Justice Black did not join the majority of the Court in extending Constitutional protection to various forms of expressive behavior which he distinguished as *conduct*.⁸⁹

A period of pragmatic dominance on the Supreme Court followed the exodus of Justice Black in 1971 during which positivism in constitutional adjudication lay dormant as a methodology until Justice Scalia revived its use. However, this rebirth of positivism has not as yet resulted in a duplication of Justice Black's holdings in first amendment expressive communication cases. A fundamental distinction is that where Justice Black

81. G. White, *The American Judicial Tradition* 336 (1976).

82. Dillard, *supra* note 78, at 110.

83. 312 U.S. 287, 61 S. Ct. 552 (1941) (Black, J., dissenting).

84. *Id.* at 301-02, 61 S. Ct. at 558-59.

85. 403 U.S. 713, 91 S. Ct. 2140 (1971).

86. *Id.* at 720, 91 S. Ct. at 2144.

87. See *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942 (1966) (Black, J., dissenting).

88. See *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725 (1952) (Black, J., dissenting).

89. See, e.g., *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780 (1971) (Blackmun, J., dissenting) (this was the "F_____ the Draft" case where Justice Harlan held for the Court that the writing on the jacket was protected communication); *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354 (1969) (Black, J., dissenting) (Justice Black disagreed with the Court's decision written by Justice Harlan stating that the First Amendment does not protect the statutorily proscribed conduct of burning the flag).

could separate *conduct* from *speech*, Justice Scalia has voted with the majority of the present Court in declaring expressive communication protected under the first amendment.⁹⁰ We get a glimpse of his reasoning in a quotation taken from the oral arguments of *United States v. Eichman* where he states that "[p]eople who burn flags clearly have a message . . . they're saying [w]e hate the United States."⁹¹ In order to better understand Justice Scalia's personal manner of positivism and its relationship with the past, an examination of some of his recent opinions on Constitutional issues confronting the Court in its last term is appropriate.

Justice Scalia's Appeal For Legal Certainty

The following review of recent Supreme Court decisions will attempt to illustrate the results of the conflicting methodologies of Justices Scalia and O'Connor. Justice Scalia's use of positivism and history in attempting to establish legal certainty will be contrasted with Justice O'Connor's approach to law which is to balance the interests of the conflicting societal elements in each case. To this end, cases centering on the issues of the right to die, abortion, diversity jurisdiction, the right of confrontation, obscenity, and the definition of cruel and unusual punishment will be examined in turn.

The Right to Die

In *Cruzan v. Director, Missouri Dept. of Health*,⁹² the recent "right to die" case, both of these Justices concurred separately in the holding of Chief Justice Rehnquist.

Justice O'Connor began her opinion by referring to other cases where "the Court has often deemed state incursions in to the body repugnant to the interests protected by the Due Process Clause."⁹³ She expressed the individual interest in the balancing equation by concluding that:

Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment.⁹⁴

90. See the flag desecration cases: *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

91. Lewis, Arguments on Flag Burning Heard, *The New York Times* (May 15, 1990), at A16, Col. 4.

92. 110 S. Ct. 2841 (1990).

93. *Id.* at 2856.

94. *Id.* at 2857.

However, she joined with the majority in deciding that the patient had not convincingly expressed that will, so her liberty interest was *not* burdened, and the state's interest in its practice did not violate the Constitution. She concluded in a pragmatic fashion⁹⁵ by proposing how to resolve these conflicting interests,⁹⁶ and stated that the Court still has not decided these other concerns.

Conversely, the first thing Justice Scalia enunciated in his opinion was that this issue is "agonizing."⁹⁷ He wrote that it is troubling to see the Court enlist itself into such a conflict at all when American law has always accorded the State the power to prevent suicide.⁹⁸ He maintained that there is no protected liberty interest "in suicide." In his analysis, he continued by stating that "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*." He then narrated, through use of history, that the petitioner cannot show "the State has deprived him of a right historically and traditionally protected from State interference."⁹⁹ This is an excellent example of Justice Scalia striving to separate law from morality. After restating the petitioner's reasons for believing her case was distinguishable from suicide, he concluded that suicide historically was not a legitimate means to cure those whose existence became too burdensome for life.¹⁰⁰

Abortion

Since the Court's decision in *Webster v. Reproductive Health Services*,¹⁰¹ there has been a flood of intellectual controversy concerning the shifting of the Supreme Court's position on abortion adopted in *Roe v. Wade*.¹⁰² The two major abortion cases before the Supreme Court last term were *Hodgson v. Minnesota*¹⁰³ and *Ohio v. Akron Center For Reproductive Health*.¹⁰⁴ Both of these cases revisited the area of informed consent laws on abortion¹⁰⁵ and, in both of these cases, a majority of the Court upheld state restrictions on a minor's obtaining an abortion because of the option of judicial bypass.

In *Hodgson*, Justice O'Connor concurred and cast the deciding vote, basing her decision on the acceptability of judicial bypass. She prefaced her analysis by stating that:

95. Throughout her concurrence she cites current medical publications which factor into her sociological viewpoint.

96. *Id.* at 2857-58.

97. *Id.* at 2859.

98. *Id.*

99. *Id.* at 2860.

100. *Id.*

101. 109 S. Ct. 3040 (1989).

102. 410 U.S. 113, 93 S. Ct. 705 (1973).

103. 110 S. Ct. 2926 (1990).

104. 110 S. Ct. 2972 (1990).

105. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035 (1979).

It has been my understanding in this area that [i]f the particular regulation does not "unduly burden" the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state interest.¹⁰⁶

After deciding that the dual parental notice requirement did unduly burden the minor's right, Justice O'Connor found that the judicial bypass has been recognized by the Court as sufficient to cure this otherwise unconstitutional burden. Thus, her analysis of abortion legislation has not changed since *Webster* and has remained consistent since her opening remarks on this topic in *Akron v. Akron Center for Reproductive Health*.¹⁰⁷

Since *Webster*, Justice Scalia has isolated himself from the rest of the Court on the abortion issue. This writer believes emphatically that his opinions about abortion are unrelated to his religious faith.¹⁰⁸ His writings on abortion have evidenced solid positivism while he sits on a Court dominated by conservative and liberal pragmatists.

In *Webster*, Scalia concurred in the judgment but would have reversed *Roe* in the process. This term, in *Ohio*, he again concurred in the Court's restriction validation on implied consent but added that:

[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins.¹⁰⁹

He then jabbed at the rest of the Court by stating that "[l]eaving this matter to the political process is not only legally correct, it is *pragmatically* so."¹¹⁰

The quest for legal certainty has led Justice Scalia to disavow the Court's participation in this field as he perceives there to be no direction from the sovereign or any otherwise legitimate precedent on the right to abortion.

In *Hodgson*, more of the same was launched from his pen. He wrote succinctly that:

The random and unpredictable results of our consequently un-

106. 110 S. Ct. at 2949-50.

107. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 103 S.Ct. 2481 (1983). See also Note, *supra* note 39.

108. See Kannar, *supra* note 9, at 1312.

109. 110 S. Ct. at 2984.

110. *Id.* (emphasis added).

channeled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have the authority to do so.¹¹¹

His emphasis on the need for predictability is an attack on the rest of the Court's pragmatic weighing of each statute that may impinge on a woman's "right" to an abortion. Further, his revulsion to the Court not finding the law but devising its own law is based on his positivistic belief that the legislature is the primary lawgiver.

These opinions in this area of law are written in the same tone and style as set forth by Justice Black in his dissent in *Griswold*. There, in his withering dissent, he blasted the majority by foreshadowing the following:

The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.¹¹²

Some would argue that from this decision, the majority in the Supreme Court fixed a "mantle of arrogance" upon itself in the right to privacy arena.¹¹³ Justice Scalia has attempted to throw off this mantle, which he considers an albatross about the neck of the Court.¹¹⁴ Thus, the recent conflict between Scalia and O'Connor on abortion is not a localized limited battle, but a revival of the struggle that *Griswold* launched between positivists and pragmatists on the right to privacy.

As the sole positivist on a Court dominated by pragmatists, Justice Scalia appears, at times, to be radical in his thinking.¹¹⁵ However, on abortion, he advocates what he believes to be the just course for both sides of this "clash of absolutes,"¹¹⁶ removing the issue from the province of the federal courts where both conservative and liberal pragmatists are playing croquet with every questionable state restriction.

111. 110 S. Ct. at 2961.

112. 381 U.S. at 521, 85 S. Ct. at 1701-02.

113. See W. Eaton, *supra* note 40, at 39. See also, e.g., Ely, On *Roe v. Wade*, 82 Yale L.J. 920, 933 (1973) ("What they [the Court] fail to do is even begin to resolve that dilemma so far as our governmental system is concerned by associating either side of the balance [of the unborn fetus and the woman] with a value inferable from the Constitution.").

114. See Norton, *Anthology of English Literature* 295 (vol.2 3d ed. 1962) (Samuel Coleridge's *The Rime of the Ancient Mariner*, verses 141-42.).

115. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597 (1988).

116. L. Tribe, *supra* note 67.

The current Court's "game of croquet" has state legislators pondering how to hit their ball through the hoops of precedents in order to finish at the peg of constitutionality. Justice Scalia avers that the Court should take its mallets and go home because cavorting in this game does not end in legal certainty. It only results in "unchanneled individual views"¹¹⁷ which cause greater unpredictability in determining rights under the due process clause of the Constitution.

Diversity Jurisdiction

In *Carden v. Arkoma Associates*,¹¹⁸ Justice Scalia, writing for the Court, held that a limited partnership is not a citizen for purposes of diversity jurisdiction and that a federal court must look to the citizenship of the limited and general partners to determine whether there is complete diversity.¹¹⁹ The respondent limited partnership was attempting to invoke federal diversity jurisdiction. The Fifth Circuit Court of Appeals had found complete diversity, reasoning that the limited partnership's citizenship should be determined by reference to the citizenship of the general partners and not the limited partners. Justice Scalia based his holding on Court precedents stemming from *Chapman v. Barney*.¹²⁰ That case held that "a joint stock company organized under a law of the State of New York . . . is a citizen of that State . . . [b]ut cannot be a *citizen* of New York [for diversity purposes] unless it be a corporation."¹²¹ He explained further that this doctrine was "unbreached" through precedents¹²² except for the granting of jurisdiction to an entity known as a *sociedad en comandita*.¹²³

The counterargument advocated by the respondent and taken up by Justice O'Connor was that the Court should only look to the "real parties to the controversy" to determine diversity. This contention was analogized from the Court's decision in *Navarro Savings Assn. v. Lee*,¹²⁴ where it held that only the citizenship of trustees and not beneficiaries of a trust is to be determined for diversity jurisdiction. Thus, only the citizenship of the general partners, those who actively manage the partnership, should be inquired into for diversity.

Justice Scalia, again drawing on positivism, dismissed this proposal by distinguishing "the rule, 'more than 150 years' old, which permits

117. 110 S. Ct. 2961.

118. 110 S. Ct. 1015 (1990). This case is an example of Justice Scalia's positivism in statutory interpretation.

119. 110 S. Ct. at 1021, 1022.

120. 129 U.S. 677, 9 S. Ct. 426 (1889).

121. *Id.* at 682, 9 S. Ct. at 428.

122. 110 S. Ct. 1015.

123. *Id.*; see *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S. Ct. 447 (1933).

124. 446 U.S. 458, 100 S. Ct. 1779 (1980).

trustees to sue in their own right without regard to the citizenship of the trustees."¹²⁵ However, even he admitted that "[t]he resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."¹²⁶ He declared that any changes which will augment the current rule of requiring the Court to look to less than an entity's full membership for diversity should be addressed by Congress. He concluded by explaining that this decision is not the failure to accommodate the "changing realities of commercial organization [but] honors the more important policy of leaving that to the people's elected representatives [in Congress]."¹²⁷

This decision is another example of Scalia's attempting to provide the court system with uniformity, as now it will not have to weigh, pragmatically, when the societal interests and the public interests are so significant in individual entities as to grant them citizenship in diversity.

Justice O'Connor's dissent stresses the value of this "real party" test, taking into account the business realities of the case, and the similar lack of control which limited partners have even compared to stockholders of corporations.¹²⁸ However, this reasoning would unfortunately subject the lower courts to new and artfully pleaded "citizenship" arguments for various unincorporated entities, and would encourage *ad hoc* pragmatic decisionmaking.¹²⁹

Right to Confrontation

In the criminal procedure field, last term the Court decided *Maryland v. Craig*,¹³⁰ and held that the confrontation clause of the sixth amendment does not guarantee a defendant an absolute right to a face-to-face confrontation with his accusers.¹³¹ The state statute permitting the use of a one-way closed circuit television to protect sexually abused minors in testifying was held to further an important state interest that did not

125. 110 S. Ct. at 1019.

126. *Id.* at 1021.

127. *Id.* at 1022.

128. *Id.* at 1026. Some would argue this dissent represents an example of Justice O'Connor's *legal realism*, but this author posits that within her pragmatism rests the principles of realism just as Justice Scalia uses history in supporting his positions.

129. This could eventually lead to forum shopping by party litigants within states where different federal districts within states would establish different standards for "citizenship."

130. 110 S.Ct. 3157 (1990). See also Kannar, *supra* note 9, at 1329, where Professor Kannar discusses Justice Scalia's opinion in *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798 (1988), which was a precursor to *Craig*.

131. 110 S. Ct. at 3163.

impinge on the confrontation clause's truth-seeking or symbolic purposes.¹³²

In this case, Justice O'Connor balances the state's interest in prosecuting these heinous crimes, the individual victim's rights, the public interest in assuring that the reliability of the confrontation clause is not violated, and the individual defendant's right to confrontation. In holding that face-to-face confrontation is not absolute, Justice O'Connor balanced the state's interest in protecting those "who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator"¹³³ against the defendant's right to face his accusers.¹³⁴ She held that:

We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his accusers in court.¹³⁵

The state must be able to make an adequate showing of necessity to use such procedures which deny the defendant's right of confrontation. She continued that "[t]he requisite finding of necessity must be a case-specific one . . . [with] the trial court also finding that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant."¹³⁶

These factors, of necessity, are viewed by five members of the Court as sufficient to deny a criminal defendant his Constitutionally guaranteed rights. This is an example of "conservative pragmatism" which cuts against vested rights when those rights are outweighed by conflicting societal interests.

Justice Scalia, echoing the language of Justice Black in *Gideon v. Wainwright*,¹³⁷ stated emphatically in his opinion that: "[t]he Sixth Amendment provides, with unmistakable clarity, that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.' The purpose of enshrining this protection in the Constitution was to ensure that none of the policy interests from time to time pursued by statutory law could overcome a defendant's right to face his accusers in court."¹³⁸

132. Id. at 3166-67.

133. Id. at 3167.

134. Id.

135. Id.

136. Id. at 3169.

137. 372 U.S. 335, 83 S. Ct. 792 (1963) (This was a sixth amendment case on the Right to Counsel in which Justice Black stated that "[a]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344, 83 S. Ct. at 796. The right to counsel is so fundamental and essential to a fair trial that a denial thereof constitutes a denial of due process.).

138. 110 S. Ct. at 3171.

Again, as above in *Carden*, Justice Scalia acknowledged that the "screening" of child witnesses in these cases "[p]erhaps . . . is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution."¹³⁹

He distinguished the majority's use of precedent as not pertaining to the right of confrontation of witnesses appearing before the trier of fact, but only corroborative of the use of hearsay evidence when the declarant is unavailable. In this case, the witness was available and the unwillingness to testify could not be a valid excuse for violation of the confrontation clause.¹⁴⁰ Further, he held that any defect in the confrontation clause "cannot be corrected by judicial pronouncement that it is archaic For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it."¹⁴¹ This statement rests on his principles of adjudication as he illustrates the positivistic maxim that "even a bad rule is better than no rule."¹⁴²

He concluded by assaulting the logic of the majority which:

today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.¹⁴³

Hence, the results which flow from the distinction between pragmatism and positivism are dramatically visible. Now, an individual, in the direst peril of his liberty, can be denied his or her basic rights under the Constitution in a case-by-case adjudication which provides a litigant's legal counsel no appreciable opportunity of outcome determination.

This decision is disturbing because the balancing of societal interests infused into a traditionally absolute constitutional provision such as the right to confrontation may open the door to similar analyses limiting other traditional liberty provisions of the Constitution in criminal procedure.¹⁴⁴

139. *Id.* at 3172-75.

140. *Id.* at 3174.

141. *Id.* at 3176.

142. See Scalia, *supra* note 58.

143. 110 S. Ct. at 3176.

144. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149 (1987); Kannar, *supra* note 9, at 1324.

In *Hicks*, Justice Scalia, writing for a Court divided 6-3, strictly construes the "plain view" exception to the Exclusionary Rule.

Obscenity

In *FW/PBS, Inc., v. City of Dallas*,¹⁴⁵ writing for the Court, Justice O'Connor held in part that a Dallas licensing provision regulating sexually oriented businesses was unconstitutional because it did not contain the procedural safeguards of *Freedman v. Maryland*.¹⁴⁶ Justice O'Connor utilized two of the conditions which require the licensing decision to be completed within a reasonable time, and provide the possibility of prompt judicial review in the event the license is denied.¹⁴⁷ She explained that "[t]he core policy underlying *Freedman* is that the license for a first amendment protected business must be issued within a reasonable time because undue delay results in the unconstitutional suppression of protected speech."¹⁴⁸ In her opinion, she narrowly tailored the above test factors in accordance with the underlying principle that "a prior restraint of speech bears a heavy presumption against its constitutional validity."¹⁴⁹

Justice Scalia dissented from this portion of her opinion, maintaining that the activity to be regulated constituted obscenity and is unprotected by the Constitution.¹⁵⁰ He based this contention on the legal rules which the Court set forth in previous obscenity cases including *Miller v. California*¹⁵¹ and *Ginzburg v. United States*.¹⁵²

145. 110 S. Ct. 596 (1990).

146. 380 U.S. 51, 85 S. Ct. 734 (1965).

147. 110 S. Ct. at 606. Justice O'Connor decides that only the first two parts of the procedural test espoused in *Freedman* are required in determining the validity of this ordinance. Justices Brennan, Marshall, and Blackmun concurring in the result felt that all three prongs of the *Freedman* test should have been invoked.

This third prong would obligate the municipality to bear the burden of going to court and to justify its decision once in court. *Id.* Justice O'Connor distinguished the movie censorship of *Freedman* from this ordinance as here "the city reviews the general qualifications of each license applicant, a ministerial act which is not presumptively invalid." *Id.* at 607.

148. *Id.* at 606.

149. *Id.* at 604.

150. *Id.* at 618.

151. 413 U.S. 15, 93 S. Ct. 2607 (1973). "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S. Ct. at 2615.

152. 383 U.S. 463, 86 S. Ct. 942 (1966). But see Justice Stevens' concurrence in *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 617 (1990), wherein he reargued an earlier dissent that "*Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817 (1976)."

He writes, however, that the misapplication of these standards has driven communities that wish to deter such objectionable behavior to resort to various means which also impinge on protected communications. Concluding this portion of his analysis he stated that "[i]t does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents."¹⁵³

Thus, Justice Scalia recognized the positivistic notion that precedents are a source of law which can be drawn on to determine a cognizable rule of law. The rule he formulated in this case is "[the Court should] recognize that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene."¹⁵⁴

He admitted that this mode of analysis is different from the rigid test for obscenity that is applied to an individual book or film.¹⁵⁵ However, the regulation in question is not directed at particular works, but only the concentration of the prohibited activities "and constitutional analysis should be adjusted accordingly."¹⁵⁶

He closed his dissent with a quotation from Chief Justice Warren in the *Jacobellis v. Ohio* opinion.¹⁵⁷ The quotation explains the rationale of the Court's obscenity exception from first amendment protection.¹⁵⁸ Chief Justice Warren's phraseology is couched in pragmatism, but one should not interpret Justice Scalia's borrowing of this noble idea as a defection on his part from his positivist philosophy. Instead, it reasonably can be stated that Scalia believes these tests on obscenity, which are justified by a *pragmatic* approach, support a greater *legal certainty* for society than the cumbersome and generally overbroad attempts of local communities to vitiate obscenity.

Cruel and Unusual Punishment

In *Penry v. Lynaugh*,¹⁵⁹ Justice O'Connor's opinion held that, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of the defendant's mental retardation and

153. 110 S. Ct. at 619.

154. *Id.*

155. *Id.* at 625.

156. *Id.*

157. 378 U.S. 184, 84 S. Ct. 1676 (1964) (Warren, C.J., dissenting).

158. 110 S. Ct. at 625. "... to reconcile the right of the Nation and of the States to maintain a decent society, and, on the other hand, the right of individuals to express themselves freely. . . ."

159. 109 S. Ct. 2934 (1989).

abused background by declining to impose the death penalty, the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in its sentencing decision.¹⁶⁰ The opinion also held that the eighth amendment does not preclude the execution of a mentally retarded person of the defendant's ability, who has been convicted of a capital offense, simply because of the fact of mental retardation alone.¹⁶¹

Justice O'Connor first asserted that, under *Teague v. Lane*,¹⁶² this case does not announce a "new rule" as "the result was not *dictated* by precedent existing at the time the defendant's conviction became final."¹⁶³ She based this conclusion on the argument that the defendant only asks the state to fulfill, to the assurance in *Jurek v. Texas*,¹⁶⁴ that the special issues determining imposition of the death penalty would be interpreted "broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing a sentence."¹⁶⁵

In determining that the jury instructions were inadequate to provide the jury with a procedural means of expressing its consideration of the mitigating factors involved, Justice O'Connor consulted the record of the trial. There she discovered that the prosecutor had stressed to the jury that only the instructions given them by the judge¹⁶⁶ should be considered in deciding whether to impose the death penalty. She thus decided that a reasonable juror could well have believed that mitigating factors could not be considered.¹⁶⁷

Justice Scalia disagrees with Justice O'Connor's interpretation of *Teague*, and states that its holding

160. 109 S. Ct. at 2952.

161. *Id.* at 2958.

162. 489 U.S. 288, 109 S. Ct. 1060 (1989).

163. 109 S. Ct. at 1070.

164. 428 U.S. 262, 96 S. Ct. 2950 (1976). This case upheld the constitutionality of the Texas death penalty statute against an eighth amendment challenge.

165. 109 S. Ct. at 2945.

166. *Id.* at 2942. These instructions or "special issues" upon which hinge the imposition of the death penalty under the Texas Penal Code are as follows:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed *deliberately* and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a *probability* that the defendant would commit *acts of violence* that would constitute a *continuing threat* to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Texas Criminal Procedure Code Ann. § 37.071(b) (Vernon 1990). The italicized sections in the statute above are the words or phrases which the counsel for the defense argued were ambiguous, and should have been specially charged to the jury with definitions on their full meaning.

167. 109 S. Ct. at 2950.

rested upon the historical role of habeas corpus in our system of law, which is to provide a "deterrence," "the threat of [which] serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."¹⁶⁸

His position is that this deterrent effect becomes hollow when the law is so uncertain that a judge acting in good faith still reads the Court's precedents unconstitutionally.¹⁶⁹ Accordingly, he believes that, under *Teague*, when the Court replaces uncertainty in the law with a clear rule, the Court is creating a "new rule" because this result could not logically be *dictated* by prior cases.¹⁷⁰ His concern is that the majority views *Teague* as mandating that this *not* be a "new rule," thus gutting the case's legal foundation in habeas corpus and possibly requiring limitation of the holding only to situations of plain overruling.¹⁷¹ This is consistent with Justice Scalia's philosophy, which has as one of its canons respect for precedent and *stare decisis*, urging legal certainty.

Turning to the merits of the case, he charges that the majority "cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by 'narrow[ing] a sentencer's discretion to *impose* the death sentence,' but expanding his discretion to '*decline to impose* the death sentence.'"¹⁷² The majority does this by forcing upon the sovereign state's constitutional criminal procedure the added burden of assuring that the sentencer must now fully consider all the mitigating evidence "*for all purposes, including purposes not specifically permitted by the questions.*"¹⁷³ He concluded by criticizing the Court's pragmatic weighing of the individual interest above that of the public interest in "protecting the jury's objective consideration of the particularized circumstances."¹⁷⁴ He identified the Court's disruption of the former course of striking a balance between complete discretion of the jury and no discretion in sentencing by declaring that:

[i]t is an unguided, emotional "moral response" that the Court demands be allowed—an outpouring of personal reaction to all the

168. Id. at 2964.

169. Id.

170. Id. at 2964-65; See *Teague*, 109 S. Ct. at 1070.

171. 109 S. Ct. at 2965.

172. Id. at 2968; quoting from *McClesky v. Kemp*, 481 U.S. 279, 304, 107 S. Ct. 1756, 1773 (1987) (emphasis in *McClesky*).

173. 109 S. Ct. at 2966.

174. Id. at 2968.

circumstances of a defendant's life and personality, an unfocused sympathy. Not only have we never before said the Constitution requires this, but [our cases] have sought to eliminate precisely the unpredictability it produces.¹⁷⁵

Therefore, in his argument on the merits, Justice Scalia again appeals for certainty in the area of criminal adjudication. Nowhere in the law are the stakes so high as in criminal cases. Justice Scalia is keenly aware of this fact and, because of the awesome responsibility of being the final voice on what is the law, he demands razor thin precision in this field.

Summary

The cases reviewed above were chosen to juxtapose Justice Scalia's positivism against Justice O'Connor's pragmatism. This writer believes that an accurate depiction of Justice Scalia's methodology can be constructed from the cases only by scrutinizing his writings in relation to those of other members of the Court; no better representative of the pragmatism displayed by the rest of the Court exists than Justice O'Connor. This sampling of recent cases which contrasts the opinions of Justices Scalia and O'Connor is thus illustrative of the positivist principles upon which Justice Scalia bases his decision making.

Conclusion

In attempting to gain access to the Court, a lawyer must first be mindful of the "rule of four," this being the number of Justices required for issuing a writ of certiorari.¹⁷⁶ Thus, if one could garner the vote of Justice Scalia, only three other Justices need be convinced to accept the writ. To be successful, an argument addressed to Justice Scalia should attempt to provide him with an opportunity to inject predictability and *legal certainty* into the law. Conversely, if one pens an application for certiorari in a manner which seeks to rely on the Court as an arbiter of conflicting societal interests, the application will likely not be signed by him. The message of this article is that when drafting applications or briefs for the Court, an attorney should be mindful of the differing philosophical positions of the Justices on the Court. It is easy to be cynical and assume that many pragmatists are only result-oriented;¹⁷⁷ however, it can be successfully argued that most of the other pragmatists on the Court today do not have an "agenda."

175. *Id.*

176. See J. Nowak, R. Rotunda & J. Young, *supra* note 52, at 35; see also W. Harbaugh, *supra* note 1, at 263; wherein Chief Justice Rehnquist describes the "cert pool" of clerks among some of the Justices.

177. See, e.g., Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293 (1976).

Although beguiling to some, Justice Scalia's methodology has been explained in this article as consistent with principles of positivist philosophy and not centered in any way upon considerations of policy or morality. This helps to expose to the practitioner the underlying reasons why Justice Scalia might agree to an application for certiorari or vote in his or her client's favor. In his endeavor to adhere to a law of rules, Justice Scalia will invoke history to support his reasoning. Therefore, the clever attorney preparing his arguments for the Court should always include legitimate historical bases for supporting his interpretation of the statute or precedents in controversy. Finally, if the precedents or statutes in question have been interpreted adversely to your position in the case, all bases of law should be utilized to urge that the prevailing rules create arbitrary and unpredictable results which shroud *the spirit of legal certainty*.

Beau James Brock